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978-1-009-31030-7 — Transnational Fiduciary Law
Edited by Seth Davis , Thilo Kuntz , Gregory Shaffer
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1

Theorizing Transnational Fiduciary Law

A Processual Framework

Seth Davis and Gregory Shaffer

1.1 INTRODUCTION

It began with the South Sea Bubble. Shares of the South Sea Company, which had a paper monopoly on trade with South America, had soared after Parliament agreed to have the Company take over the national debt. The bubble burst, as bubbles do. Among the many unfortunate investors was Lord Macclesfield, a chancellor who had taken funds filed by litigants with the Court of Chancery and invested them for his own profit as the South Sea Bubble expanded. Macclesfield was impeached, removed from office, and replaced by the man who presided over his trial, Peter King, lately the Chief Justice of the Court of Common Pleas. To Lord Chancellor King we owe the modern ideal that a fiduciary should not profit from exercising their authority over another person's interests.[1]

The problems that fiduciary law addresses today are no less important globally than they were when the South Sea Bubble exposed Chancery's corruption. Then, and much more so today, fiduciary law bears upon the governance of capital that crosses national borders. Fiduciary law's complex relationship with colonialism and imperialism – which began long before the South Sea Company sought a monopoly on a trade focused upon slavery – continues in contemporary struggles against neocolonial and imperial domination. And today, unlike in 1720, there are also international organizations seeking to shape the law of fiduciary duties in response to global problems, such as climate change.

Fiduciary law's reach has grown since the era when the Court of Chancery dominated the development of trust doctrine. It is no longer plausible to understand

[1] *See* Joshua Getzler, *As If Accountability and the Counterfactual Trust*, 91 B.U. L. Rev. 973, 983 (2011). ("It was Lord Chancellor King who crystallized the idea that a fiduciary assumes an office that permits no profit or conflicts of interest.") On the South Sea Bubble, *see*, *e.g.*, Julian Hoppit, *The Myths of the South Sea Bubble*, 12 Transactions of the Royal Hist. Soc'y 141 (2002).

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the trust as the "distinctive achievement of English lawyers," a description that F. W. Maitland offered in his influential lectures on equity.[2] Trust law has gone transnational. Indeed, it had already crossed national borders before the posthumous publication of Maitland's lectures in 1909. Today, distinctive innovations in trust law are as apt to come from the Cayman Islands as from England. Offshore jurisdictions are competing for the business of holding and managing global wealth. They have enacted comprehensive trust regimes that flout basic precepts of English trust law – the very trust law that scholars have taken as paradigmatic of the field. Onshore jurisdictions – including states within the United States – now follow the lead of these offshore jurisdictions. Competition for transnational trust business, in other words, contributes to the development of trust law transnationally.

Today, stakeholders invoke fiduciary law not only to address traditional private law matters like wealth management. They also point to norms of fiduciary responsibility to enjoin transnational corporations to respect human rights,[3] to combat corruption of public officials,[4] and to constrain national governments so that they respect the rights of Indigenous Peoples.[5] The appeal of the fiduciary norm lies in its ideal of regard for others, which offers a response to the pursuit of unconstrained self-interest in business relations and the abuse of public office for private gain.

As Justice Benjamin Cardozo famously wrote, fiduciary law's ideal of other-regarding loyalty demands "something stricter than the morals of the marketplace."[6] Fiduciary law thus responds to a pervasive problem that cuts across common law and civil law traditions and state borders and is manifested in discrete domains within

[2] F. W. Maitland, Equity; Also the Forms of Action at Common Law 23 (1909).

[3] *See* Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. Davis L. Rev. 1183 (2016); Jonathan Zittrain, *How to Exercise the Power You Didn't Ask For*, Harv. Bus. Rev. (Sept. 19, 2018), https://hbr.org/2018/08/how-to-exercise-the-power-you-didnt-ask-for; Jack M. Balkin & Jonathan Zittrain, *A Grand Bargain to Make Tech Companies Trustworthy*, The Atlantic (Oct. 3, 2016), https://www.theatlantic.com/technology/archive/2016/10/information-fiduciary/502346.

[4] *See* U.S. House of Representatives, The Trump-Ukraine Impeachment Inquiry Report 8 (Dec. 2019) (quoting Alexander Hamilton for proposition that impeachment is appropriate for "the abuse or violation of some public trust"); U.S. House Committee on Oversight and Reform, Chairman Nadler Announces the Introduction of Articles of Impeachment Against President Donald J. Trump (Dec. 10, 2019), https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=2179 (reporting Chairman Jerrold Nadler's remarks that "Our President holds the ultimate public trust"); Andrew Kent et al., *Faithful Execution and Article II*, 132 Harv. L. Rev. 2111, 2119 (2019) (arguing that under the US Constitution, executive officers have a fiduciary duty to faithfully execute the laws); *see also* Evan J. Criddle & Evan Fox-Decent, Fiduciaries of Humanity: How International Law Constitutes Authority 79 (arguing that there is a human right against public corruption grounded in fiduciary theory of international human rights law).

[5] Seminole Nation v. United States, 316 U.S. 286, 296–97 (1942) (holding that United States has fiduciary duties to American Indian Tribes); Seth Davis, *American Colonialism and Constitutional Redemption*, 105 Calif. L. Rev. 1751 (2017) (describing and critiquing the Indian trust doctrine of US law).

[6] Meinhard v. Salmon, 164 N.E. 545, 546 (1928).

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different legal fields. The problem is one of holding a person entrusted with discretionary authority over the interests of another to their other-regarding mandate. Fiduciary law seeks to address and solve this problem by imposing norms – such as those regarding a duty of loyalty – that direct fiduciaries to further the purposes of their entrusted authority.

The transnational dimensions of fiduciary law remain largely unexplored. Scholars have tended to study fiduciary norms within specific legal domains, such as agency law, corporate law, and trust law, and they have tended to do so in terms of national private law.[7] Only recently have they treated "fiduciary law" as a meta-concept and a potentially unified field across subject areas and national legal systems. Most of this scholarship has been conceptual and has focused on formal law. It has treated fiduciary law as something the state – particularly through state courts – makes and applies. When scholars have recognized that the formal law governing fiduciary relations interacts with private ordering and customary practices, moreover, their inquiries have mostly stopped at state borders.

Fiduciary law has a long history that includes the common law and equity, Roman law and civil law, as well as canon law, classical Islamic law, and classical Jewish law. Private fiduciary law – the law of agency, trusts, corporations, and the like – has transnational dimensions, both in its history and in its contemporary applications. So too does public fiduciary law; the revival of interest in fiduciary law's contemporary application to government actors hearkens back to the Roman Republic, as well as to the origins of modern international law.[8] Historically, the public and private faces of fiduciary law were not always as distinct, as shown, for example, by Edmund Burke's famous denunciation of the British East India Company for abusing its public trust.[9] Today, the line between public and private responsibility remains contested in the regulation of fiduciaries, as exemplified in arguments that governments should establish "public trusts" to protect personal data and that tech companies owe fiduciary duties with respect to their collection, use, and transfer of such data.[10]

International organizations and nongovernmental organizations (NGOs) also have challenged settled understandings of fiduciary norms. In 2019, the United Nations, in partnership with private sector finance and institutional investors, issued

7 By "private law," we refer to formal state law governing private relationships (such as the law of contract). This should be distinguished from norm development by private associations and private parties, which we at times refer to as private rulemaking.
8 *See, e.g.*, Evan J. Criddle, *Liberty in Loyalty: A Republican Theory of Fiduciary Law*, 95 Tex. L. Rev. 993 (2017).
9 *See* Chapter 10.
10 *See* Aziz Z. Huq, *The Public Trust in Data*, 110 Georgetown L.J. 333 (2021); *see also supra* note 3 and accompanying text.

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a report entitled "Fiduciary Duty in the 21st Century."[11] Its ambitious aim was to restate the fiduciary duties of investors to encompass environmental, social, and governance (ESG) goals. Former United States Vice President Al Gore helped launch this project with a YouTube announcement, proclaiming that "fiduciary duty is not a barrier to investing sustainably."[12] NGOs such as the Global Legal Action Network and the Children's Trust have drawn upon fiduciary law through human rights litigation to hold governments responsible for responding to climate change. Domestic courts in the Americas, Europe, and Asia, as well as the European Court of Human Rights, have entertained these claims, with some claimants prevailing on the merits.[13]

These transnational developments acutely present the challenge of theorizing – much less potentially unifying – the field of fiduciary law. The concept of a fiduciary relationship is capacious. It can plausibly encompass everything from wealth management to managing the environment for future generations. Yet, there is tension between applying fiduciary norms to discrete problems in different fields and conceptual scholars' dream of a unified field of fiduciary law.[14]

This book explores this interaction of conceptualizations and discrete problem-solving in the transnational development of fiduciary norms. In particular, the book focuses upon the processes through which conceptualizations of fiduciary relationships and fiduciary norms may or may not settle transnationally – or become unsettled – as actors invoke fiduciary norms to address problems in different domains. It tests the ambitions of a unified theory of fiduciary law that would align theory and practice beyond state borders. In doing so, the book challenges fiduciary theorists to ask whether "unification" of the field of fiduciary law across national boundaries is achievable, and even if achievable in particular subfields, what variations might remain. The complications and challenges of any transnational convergence of fiduciary norms involve political relations, power dynamics, and social norms that fiduciary theorists often elide.

Thus, the aim of this book is not to unify fiduciary law. Instead, it develops a framework for understanding what unification – or in its terms, transnationalization –

[11] United Nations Environment Programme Finance Initiative, Fiduciary Duty in the Twenty-first Century (Oct. 2019), https://www.unepfi.org/wordpress/wp-content/uploads/2019/10/Fiduciary-duty-21st-century-final-report.pdf.

[12] Al Gore, *Fiduciary Duty in the Twenty-first Century*, PRI, https://www.youtube.com/watch?v=PKRIW2yc5WA.

[13] For an introduction to this litigation, *see* Michael C. Blumm & Rachel D. Guthrie, *Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision*, 45 U.C. Davis L. Rev. 741 (2012).

[14] *See, e.g.*, Hanoch Dagan, *Fiduciary Law and Pluralism*, *in* The Oxford Handbook of Fiduciary Law (Evan J. Criddle et al. eds. 2019). *Cf.* Paul B. Miller, *The Identification of Fiduciary Relationships*, *in* Criddle et al., *id.* at 367 (conceptualizing the field in terms of "several unifying principles") *with* Andrew S. Gold, *The Loyalties of Fiduciary Law*, *in* Philosophical Foundations of Fiduciary Law (Andrew S. Gold & Paul B. Miller eds., 2014) (stressing differences between multiple conceptions of loyalty in different settings).

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might entail not just in theory but also in practice. The book draws upon transnational legal theory, and, in particular, the theoretical framework of transnational legal ordering, which can give rise to transnational legal orders, as developed by Terence Halliday and Gregory Shaffer. This work provides a way of understanding processes of transnational legal ordering – involving norm construction, conveyance, contestation, and resistance – which can produce a transnational legal order (or TLO). They define a TLO, in terms of a Weberian ideal type, as "a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions."[15] TLO theory provides a framework for assessing how norms and institutions interact at the transnational, national, and local levels of social organization, pursuant to which legal norms settle, unsettle, and change in transnational context.

The chapters in this book examine the dynamic and recursive processes through which fiduciary norms are conveyed across borders and shape the practices of transnational, national, and local actors and institutions across an array of issue areas. By bringing together scholars working in both common law and civil law traditions, this book seeks to open new inquiries into the development and practice of fiduciary law in transnational contexts. The chapters' authors include both fiduciary theorists whose work has aimed to unify fiduciary norms across particular domains, and scholars who work on the gaps between theory and practice in those domains. While some are more open to the promise of a unified fiduciary law, others are quite skeptical of it. The contests over framing among stakeholders thus spill over into these pages in ways that deepen the questions explored, including the following:

- To what extent are fiduciary norms converging such that they can be viewed as part of a TLO, if not generally, then in discrete subject areas? Is a body (or bodies) of fiduciary law at times emerging transnationally as a function of domestic legal responses to common problems of entrusted authority? Or are transnational processes of problem construction, norm propagation, diffusion, and application also playing important roles?
- Has the transnational legal ordering of fiduciary law institutionalized in certain domains? Where that is the case, what processes and mechanisms drive institutionalization?
- How does the legal ordering of private fiduciary law align and compete with other areas of law where fields overlap, such as public regulation in the areas of finance, environmental law, and information law?
- What explains variation in how transnational fiduciary norms are implemented in transnational, national, and local contexts? What are the ways

[15] Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders*, *in* Transnational Legal Orders 3 (Terence C. Halliday & Gregory Shaffer eds. 2015). It is an "ideal type" in the sense of accentuating aspects of complex phenomena in an analytic construct.

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in which different legal traditions – such as common law and civil law – and different histories and cultural contexts shaping how social problems of trust and dependence are addressed through law?

- What are the interactions between the meta-conceptualization of "fiduciary law" and discrete conceptualizations of fiduciary relationships in particular fields? Are the discrete conceptualizations of most importance for national and local practice? How, if at all, do meta-concepts inform analysis and practice within discrete fields?
- What is distinctive about transnational legal ordering in the field of fiduciary law compared to other legal fields?
- What is the relationship between socio-legal (external) and jurisprudential (internal) accounts of fiduciary norms as these norms are marshaled to frame transnational problems and solutions?

Eleven case studies address these questions across different substantive areas. The five chapters in Part I address questions relating to the transnational *formation and institutionalization* of fiduciary law in different domains. They address, in particular, the tension between meta-conceptualizations of fiduciary norms and normative contestation within discrete fields. Part II's four chapters examine historical, political, and social *factors affecting the recursive development* of transnational fiduciary law over time. They illustrate how transnational fiduciary law involves dynamic processes in which hard and soft law norms and institutions interact, and through which differences in history, culture, and conceptions of social problems shape fiduciary law's application. Part III's two chapters address questions at the *frontiers* of transnational fiduciary theory, including the responsibilities of international standard-setting organizations and transnational corporations operating as information platforms. Collectively, these chapters explore how processes of transnational legal ordering can give rise to legal orders in particular areas of fiduciary law that transcend and permeate nation-states, while also assessing how convergence in formal law may nonetheless entail considerable variation in local practice.

This introduction presents the book's framework for the study of the transnational legal ordering of fiduciary law. It notes the key conceptual tools of TLO theory (such as normative settlement and the recursivity of law) and explains how these tools bear upon analytic, normative, and socio-legal inquiries into transnational fiduciary law. The introduction discusses the role of framing problems in fiduciary terms in transnational legal ordering (Section 1.2), the potential, but uneven, formation and institutionalization of fiduciary law transnationally (Section 1.3), the recursive, transnational development and limits of fiduciary law over time (Section 1.4), the conceptual frontiers of transnational fiduciary law (Section 1.5), and the contributions of the book's chapters (Section 1.6). The conclusion (Section 1.7) presents the book's principal findings regarding fiduciary law and its relation to theorizing transnational legal ordering.

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1.2 THE FIDUCIARY FRAME IN TRANSNATIONAL LEGAL ORDERING

The development of legal norms by legislatures, courts, and private actors responds to the framing of social and economic problems. The spread and deployment of transnational fiduciary law often entails contests over the framing of such problems. Financial fiduciaries manage trillions of dollars worldwide. Corporate directors cite fiduciary duties to shareholders, which they use as reasons not to invest in more environmentally sustainable ways. At the same time, governments debate whether public and private bodies have fiduciary duties to protect future generations from a rapidly warming planet. Some activists, advocates, lawmakers, and scholars think fiduciary law can meaningfully contribute to resolving a wide range of transnational problems, from public and private corruption to environmental and individual privacy protection. Others do not.

Fiduciary law has emerged as one of many frames for making sense of social problems arising from global markets and transnational governance. Erving Goffman developed the concept of framing to assess how social movement actors diagnose problems, articulate solutions, and motivate others to act collectively for change.[16] Contests over framing help us understand the ways in which different actors and institutions seek to use – or challenge – the fiduciary law framework for ordering behavior in other-regarding ways. Fiduciary law is "semantically permeable," involving openly textured principles, which social actors with diverse ideological commitments may marshal to construct activities as problems and imagine legal solutions to them.[17]

Several factors have increased the salience of the fiduciary frame for legal ordering over the past decades. One is functional – the rise of global markets increased pressure for coordinated business regulation and the convergence of fiduciary norms across jurisdictions. High-profile corporate scandals and governance failures have played important, episodic, and catalytic roles. More quotidian business activities have as well, as fiduciary law offers a way to build trust in transnational market settings when social bonds otherwise may not exist. In parallel, scholars have promoted the ideational development of fiduciary legal theory as a distinct field, illustrated by Tamar Frankel's pathbreaking work in 1983 that helped to catalyze this field, which has grown rapidly over the past decade.[18] Transnational legal education and legal practice have also contributed to the growing global salience of fidiciary

[16] Erving Goffman, Frame Analysis: An Essay in the Organization of Experience (1974); Robert D. Benford & David A. Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 Ann. Rev. Soc. 611 (2000).

[17] On framing and semantic permeability in US constitutional law, *see* Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. Pa. L. Rev. 297, 322 (2001).

[18] Until the 1980s, legal scholars had not sought to theorize fiduciary law as a field. Frankel went beyond studying discrete domains of law to define the "basic vocabulary" of fiduciary norms of loyalty and fidelity that cut across these substantive areas. Tamar Frankel, *Fiduciary Law*, 71

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law, as students and lawyers study and practice abroad, helping to bring common law fiduciary concepts to civil law jurisdictions.[19] These patterns reflect a longer history of the spread of common law fiduciary duty concepts through colonialism and imperialism. Yet, the contributions and innovations of civil law countries are often underappreciated, as the development and spread of fiduciary norms among East Asian countries in the past decades show.

Conventional histories of fiduciary law focus on developments within national borders – English borders, in particular. The typical story begins with the feoffment to uses, a predecessor to today's donative trust, under which one person (the feoffee) would hold title to property for the benefit of another person (the cestuy que use). Then, as now, the entrustment of property was bound up with taxation, as the feoffment developed as a way to avoid Crown taxation of grants or inheritances. "[F]aithless feoffees" who violated their instructions set the stage for the development of fiduciary law.[20] As a creature of equity, fiduciary law developed within the English Court of Chancery, which began in the fifteenth century to provide remedies when feoffees abused their authority. The modern conception of a fiduciary duty emerged by 1726, when the Court of Chancery, now headed by Lord Chancellor King, held in *Keech v. Sanford* that a trustee should not seek to profit from managing trust property for the benefit of another.[21] As this history highlights, English law has been central to the development of fiduciary law, which owes its global importance in part to the historical reach of capitalism and British imperialism.

The fiduciary concept has, however, historical roots that do not lie within English legal history but instead span multiple legal systems. Scholars have traced examples of fiduciary (or fiduciary-like) concepts not only to fourteenth-century devices for transferring land in England, but also to legal institutions for guardianship and the transferring of property within Roman law, as well as the laws of various religious traditions, including Sharia law, Jewish law, and canon law in medieval Europe.[22] There is, for instance, more than a passing resemblance between the *waqf*, an Islamic legal institution that allowed for the endowment of charitable institutions such as mosques or hospitals, and proto-trusts in England, such as Merton College,

Calif. L. Rev. 795, 829–30 (1983). ("Loyalty, fidelity, faith, and honor form [fiduciary law's] basic vocabulary.")

[19] Bryant Garth & Gregory Shaffer, The Globalization of Legal Education: A Critical Perspective (2022).

[20] Henry Smith, *Why Fiduciary Law Is Equitable*, *in* Gold & Miller, *supra* note 14, at 261, 263 (quoting 1 Austin Wakeman Scott et al., Scott & Ascher on Trusts § 1.5, at 14 (5th ed. 2006)).

[21] (1726) 25 Eng. Rep. 223, 223–24.

[22] David Johnston, *Trusts and Trustlike Devices in Roman Law*, *in* Itinera Fiduciae: Trust and Treuhand in Historical Perspective 45, 51 (Richard Helmholz & Reinhard Zimmermann eds. 1998); *see* Tamar Frankel, Fiduciary Law 79–97 (2010) (discussing historical development of fiduciary law and citing examples from Laws of Hammurabi, Sharia law, Jewish law, Roman law, and Medieval European law).

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Oxford, incorporated in 1274, leading some scholars to suggest that Islamic law may have influenced the development of English trust law.[23] On this point, Islamic law may in turn have borrowed from Roman law by way of the Byzantines,[24] but whatever the precise influences may be, history reveals fiduciary institutions without English origins.

That is not to deny, however, the crucial role that English law and English imperialism played in the transnational development of fiduciary law. Too often, the role of power is left out of the story of fiduciary law's development. The development of trust law in India, for example, emerged from the collision of the "practices of European settlers," foremost among them codification efforts of British imperial authorities, with "'trust-like' devices" that predated the imperial period, including the *waqf* of Islamic law as well as Hindu devices for charitable and religious endowments.[25] Judges trained in English law strained to assimilate these devices, with one leading textbook insisting that the Hindu *benami* was "merely a deduction from [a] well-known principle of equity."[26] Similar stories could be told about nineteenth-century legal developments in Hong Kong.[27]

Indeed, fiduciary law did not just spread with colonialism; it was part of the law of colonial rule. As Antony Anghie has argued, colonial regimes such as the League of Nation's Mandate System justified domination through the "concept of trusteeship," which characterized colonial rule as "directed by concern for native interests . . . rather than by the selfish desires of the colonial power."[28] This colonial trusteeship was rooted in a fiduciary conception of government that "stretches back to the early days of European colonialism,"[29] and was also marshaled by apologists for slavery in the American South.[30] The trusteeship idea appears in multiple jurisdictions as a frame for the relationships between Indigenous Peoples and settler states. Kirsty Gover has compared the emergence of the Crown's common law fiduciary duties to Indigenous Peoples in New Zealand and Canada with its lack of emergence in Australia, tracing dynamics around unilateralism and legitimation

[23] *See* Avisheh Avini, *The Origins of the Modern English Trust Revisited*, 70 Tulane L. Rev. 1139 (1996); Monica M. Guiosi, *Comment, The Influence of the Islamic Law of* Waqf *on the Development of the Trust in England: The Case of Merton College*, 136 U. Pa. L. Rev. 1231 (1988).
[24] Avini, *supra* note 23, at 1156.
[25] Stelios Tofaris, *Trust Law Goes East: The Transplantation of Trust Law in India and Beyond*, 36 J. Legal His. 299, 302–03 (2015).
[26] *Id.* at 302–03 (quoting J. D. Mayne, A Treatise on the Hindu Law and Usage 374 (2d ed. 1880)).
[27] S. Po-Yin Chung, *Chinese Tong as British Trust: Institutional Collisions and Legal Disputes in Urban Hong Kong, 1860s–1980s*, 44 Modern Asian Studies 1409 (2010).
[28] Antony Anghie, Imperialism, Sovereignty and the Making of International Law 140 (2007).
[29] Davis, *supra* note 5, at 286.
[30] *Id.* at 282.

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that have clear parallels in US law's Indian trust doctrine, which holds that the US government is a fiduciary for American Indians.[31]

In addition, fiduciary law has been central to international law in terms of the responsibility of states and international organizations in colonial and postcolonial transitions. After World War I, the League of Nations set up the Mandate System for administering former colonial territories.[32] The mandates applied to territories where, in the words of the Versailles Treaty, peoples were considered not to be "able to stand by themselves under the strenuous conditions of the modern world."[33] Article 22 of the Treaty called for tutelage of these peoples to be "entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility."[34] Class A territories were those formally controlled by the Ottoman Empire and included Iraq, Syria, and Palestine. Class B and C territories were former German colonies in Africa and Oceania. After World War II, the mandates were transformed into the Trusteeship System of the United Nations, which created a Trusteeship Council.[35] Today, questions about the fiduciary duties of states also arise within the "law of occupied territories,"[36] and with respect to the responsibilities of United Nations' peacekeeping missions.[37]

Thus, historically, actors have referenced fiduciary principles in a diverse array of contexts. They include agency, corporate law, financial services, and trusts (within private law), environmental protection, cultural heritage preservation, and peacekeeping (within public law), as well as the duties of lawyers (which include both private and public responsibilities). Relationships within families entail fiduciary duties, at least sometimes, and some scholars have argued that friends as well may be fiduciaries.[38]

Many societies "have adopted fiduciary rules or similar initiatives" to regulate relationships of trust and dependence upon another's discretion.[39] In common law countries, some fiduciary relationships are recognized as a matter of convention (or, put more technically, "status"), while others are recognized as a matter of

[31] Kirsty Gover, *The Honour of the Crowns: State-Indigenous Fiduciary Relationships and Australian Exceptionalism*, 38 SYDNEY L. REV. 339 (2016); *see* Davis, *supra* note 5, at 286.
[32] *See, e.g.*, ANGHIE, *supra* note 28, at 115–95 (describing the Mandate System).
[33] Treaty of Peace Between the Allied and Associated Powers and Germany art. 22, June 28, 1919, 2 Bevans 43, 56.
[34] *Id.*
[35] *See* CRIDDLE & FOX-DECENT, *supra* note 4, at 57.
[36] Eyal Benvenisti, *Occupation and Territorial Administration*, *in* ROUTLEDGE HANDBOOK OF THE LAW OF ARMED CONFLICT (Rain Liivoja & Timothy McCormack eds., 2016).
[37] CRIDDLE & FOX-DECENT, *supra* note 4, at 300–06.
[38] *See* Ethan J. Leib, *Friends as Fiduciaries*, 86 WASH. U. L. REV. 665 (2009); Elizabeth S. Scott & Robert E. Scott, *Parents As Fiduciaries*, 81 VA. L. REV. 2401 (1995).
[39] Tamar Frankel, *Transnational Fiduciary Law*, 5 U.C. IRVINE J. INT'L TRANSNAT'L & COMP. L. 15 (2020).

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